IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.82696 of 2019
Arising Out of PS. Case No.-12 Year-2018 Thana- MADHEPURA COMPALINT CASE District- Madhepura

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DR. ASIM PRAKASH, Son of Prof. Jai Prakash Yadav, Resident of Professor Colony, situated in astern Road of P.Sc. College, Madhepura Ward No.05, P.S. and District-Madhepura.

... ... Petitioner

Versus

1. The State Of Bihar
2. Pappu Kumar Son of Late Janardan Prasad Yadav Resident of Azad Nagar Ward No.09, P.O., P.S. and District-Madhepura

... ... Opposite Parties

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Appearance :
For the Petitioner : Mr. Nilesh Kumar, Advocate
For the State : Mr. Ram Priya Sharan Singh, APP
For Opp. Party No.2 : Mr. Prahalad Kumar Bhagat, Advocate

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CORAM: HONOURABLE MR. JUSTICE SANDEEP KUMAR

ORAL JUDGMENT

Date : 09-05-2023

This application has been filed for quashing of the order dated 13.09.2019 passed by learned Sessions Judge, Madhepura, in Criminal Revision No. 07 of 2019, by which the learned Court below has dismissed the revision application filed by the petitioner against the order dated 05.12.2018 passed in Complaint Case No. 12 of 2018, whereby and whereunder the learned Judicial Magistrate, 1st Class, Madhepura, has found prima facie case under Section 420/34 of the Indian Penal Code against the petitioner and directed for issuance of summon against him.

As per the complaint petition, on 12.11.2017 the complainant was suffering from fever and he consulted the

petitioner, who is a doctor. Upon examination, the petitioner suggested the complainant for HIV test at Yadubanshi lab. Accordingly, the complainant got himself tested in the said lab. After seeing the report, the petitioner said the complainant that he is tested HIV positive and also suggested to verify his report from the Sadar Hospital, Madhepura. However, the complainant did not get himself examined in Sadar Hospital, Madhepura and went to AIIMS, New Delhi, where the report of Yadubanshi lab was found incorrect. It is alleged in the complaint petition that the petitioner connived with the administrator of the Yadubanshi lab in order to harass the complainant mentally and economically.

Learned counsel for the petitioner submits that the petitioner is a qualified medical practitioner and he treated the complainant on 12.11.2017 and upon examination the complainant was referred for HIV test but the petitioner has never referred the complainant to any particular test centre, which is evident from the prescription. He further submits that upon seeing the report, the petitioner suggested the complainant to verify the aforesaid report from the Sadar Hospital, Madhepura.

Learned counsel for the petitioner further submits

that before lodging the F.I.R. the mandatory guidelines issued by the Hon'ble Supreme Court in the case of ***Jacob Mathews vs. State of Punjab & Anr. reported in AIR 2005 SC 3180*** has not been followed.

Learned counsel for the State has opposed this application.

Learned counsel for the complainant/opposite party no.2 submits that as per the F.I.R. *prima facie* case is made out against the petitioner and therefore, this Court may dismissed this application.

I have considered the submissions of the parties. I have also perused the materials available on record. In nutshell, the allegation against the petitioner is that he attended the patient/complainant and upon investigation he suggested for HIV test and the complainant was tested HIV positive. Upon seeing the report, the petitioner suggested him for verification of the HIV report from Sadar Hospital, Madhepura but the complainant got him examined in AIIMS, New Delhi, where the report of the earlier test finding the complainant HIV positive was found incorrect and due to act of the petitioner the complainant suffered mentally and economically. However, from prescription of the doctor/petitioner, it appears that the

patient/complainant was referred for HIV test and after the complainant tested HIV positive the petitioner referred him to Sadar Hospital, Madhepura for verification of HIV positive report. There is no material on record which suggests that the petitioner connived with the administrator of Yadubanshi lab in order to harass the petitioner mentally and economically, as has been alleged in the complaint petition. In the opinion of this Court, the present complaint petition maliciously instituted with an ulterior motive.

In the case of ***Jacob Mathews vs State of Punjab and Anr. (supra)***, the Hon'ble Supreme Court has held in paragraph nos. 48 to 52 as follows:-

> *"48. Conclusions summed up we sum up our conclusions as under:-*
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> *(1) Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. The definition of negligence as given in Law of Torts, Ratanlal & Dhirajlal (edited by Justice G.P. Singh), referred to hereinabove, holds good. Negligence becomes actionable on account of injury resulting from the act or omission*

amounting to negligence attributable to the person sued. The essential components of negligence are three: 'duty', 'breach' and 'resulting damage'.

(2) Negligence in the context of medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. When it comes to the failure of taking precautions what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence. So also, the standard of care, while assessing the

practice as adopted, is judged in the light of knowledge available at the time of the incident, and not at the date of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that particular time (that is, the time of the incident) at which it is suggested it should have been used.

(3) A professional may be held liable for negligence on one of the two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence.

(4) The test for determining medical negligence as laid down in Bolam's case [1957] 1 W.L.R. 582, 586 holds good in its

applicability in India.

(5) The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of mens rea must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.

(6) The word 'gross' has not been used in Section 304A of IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be 'gross'. The expression 'rash or negligent act' as occurring in Section 304A of the IPC has to be read as qualified by the word 'grossly'.

(7) To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent.

(8) Res ipsa loquitur is only a rule of evidence and operates in the domain of civil law specially in cases of torts and helps in determining the onus of proof in actions relating to negligence. It cannot be pressed in service for determining per se the liability for negligence within the domain of criminal law. Res ipsa loquitur has, if at all, a limited application in trial on a charge of criminal negligence.

49. In view of the principles laid down hereinabove and the preceding discussion, we agree with the principles of law laid down in Dr. Suresh Gupta's case (2004) 6 SCC 422 and re-affirm the same. Ex abundanti cautela, we clarify that what we are affirming are the legal principles laid down and the law as stated in Dr. Suresh Gupta's case. We may not be understood as having expressed any opinion on the question whether on the facts of that case the accused could or could not have been held guilty of criminal negligence as that question is not before us. We also approve of the passage from Errors, Medicine and the Law by Alan Merry and Alexander McCall Smith which has been cited with approval in Dr. Suresh Gupta's case (noted vide para 27 of the report).

Guidelines re: prosecuting medical professionals

50. As we have noticed hereinabove that the cases of doctors (surgeons and physicians) being subjected to criminal prosecution are on an increase. Sometimes such prosecutions are filed by private complainants and sometimes by police on an FIR being lodged and cognizance taken. The

investigating officer and the private complainant cannot always be supposed to have knowledge of medical science so as to determine whether the act of the accused medical professional amounts to rash or negligent act within the domain of criminal law under Section 304-A of IPC. The criminal process once initiated subjects the medical professional to serious embarrassment and sometimes harassment. He has to seek bail to escape arrest, which may or may not be granted to him. At the end he may be exonerated by acquittal or discharge but the loss which he has suffered in his reputation cannot be compensated by any standards.

51. *We may not be understood as holding that doctors can never be prosecuted for an offence of which rashness or negligence is an essential ingredient. All that we are doing is to emphasize the need for care and caution in the interest of society; for, the service which the medical profession renders to human beings is probably the noblest of all, and hence there is a need for protecting doctors from frivolous or unjust prosecutions. Many a complainant prefers recourse to criminal process as a tool for pressurizing the medical professional for extracting uncalled for or unjust compensation. Such malicious proceedings have to be guarded against.*

52. *Statutory Rules or Executive Instructions incorporating certain guidelines need to be framed and issued by the Government of India and/or the State Governments in consultation with the Medical Council of India. So long as it is not*

> *done, we propose to lay down certain guidelines for the future which should govern the prosecution of doctors for offences of which criminal rashness or criminal negligence is an ingredient. A private complaint may not be entertained unless the complainant has produced prima facie evidence before the Court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor. The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion preferably from a doctor in government service qualified in that branch of medical practice who can normally be expected to give an impartial and unbiased opinion applying Bolam's test to the facts collected in the investigation. A doctor accused of rashness or negligence, may not be arrested in a routine manner (simply because a charge has been levelled against him). Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigation officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld."*

In view of the above observations of the Hon'ble Supreme Court and also for the reasons recorded hereinabove, I am of the view that the prosecution against the petitioner is nothing but an abuse of the process of the Court.

Accordingly, this application is allowed and the Complaint Case No.12 of 2018 and all consequential proceedings arising out of the aforesaid complaint including the order dated 13.09.2019 passed by learned Sessions Judge, Madhepura in Criminal Revision No.07 of 2019 and order dated 05.12.2018 passed by learned Judicial Magistrate, 1st Class, Madhepura, are hereby quashed in the interest of justice.

(Sandeep Kumar, J)

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AFR/NAFR	N.A.F.R.
CAV DATE	N/A.
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